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No. 99-2092

Supreme Court, U.S.
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In The

Supreme Court of the United States

RICHARD M. DICTER, M.D.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF AMICI CURIAE THE AMERICAN MEDICAL ASSOCIATION AND MEDICAL ASSOCIATION OF GEORGIA IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Amicus the American Medical Association ("AMA"), an Illinois non-profit corporation, is an association of approximately 300,000 physicians who practice medicine throughout the United States. The AMA was founded in 1847 to promote the science and art of medicine and the betterment of public health, and these remain its core purposes. Its members practice in all fields of medical specialization, and it is the largest medical society in the United States.[2]

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of Court pursuant to Rule 37.3 of this Court. Pursuant to Rule 37.6, *amici curiae* state that their counsel authored this brief in its entirety. No person or entity other than the *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

[2] The AMA joins this brief as a representative of the Litigation Center of the American Medical Association and the state medical societies. The Litigation Center was formed in 1995 as a coalition of the AMA and private, voluntary, non-profit state medical societies to represent the views of organized medicine in the courts. Forty-nine state medical societies join the AMA as members of the Litigation Center. The member organizations, in addition to the AMA, are: Medical Association of the State of Alabama, Alaska State Medical Association, Arizona Medical Association, Arkansas Medical Society, California Medical Association, Colorado Medical Society, Connecticut State Medical Society, Medical Society of Delaware, Medical Society of the District of Columbia, Florida Medical Association, Medical Association of Georgia, Hawaii Medical Association, Idaho Medical Association, Illinois State Medical Society, Indiana State Medical Association, Iowa Medical Society, Kansas Medical Society, Kentucky Medical Association, Louisiana Medical Society, Maine Medical Association, MedChi, the Maryland State Medical Society, the Massachusetts Medical Society, Michigan State Medical Society, Minnesota Medical Association, Mississippi State Medical Association, Missouri

Amicus the Medical Association of Georgia ("MAG") is a non-profit, voluntary professional association of Georgia physicians. MAG was founded in 1849, is affiliated with the AMA, and is the largest physicians' association in Georgia. Presently, MAG has over 7,500 members – more than 5,000 of whom are physicians actively practicing medicine in the state of Georgia. MAG is an active advocate for Georgia physicians and their patients.

The interest of the AMA and MAG in this issue is to preserve the integrity of the state medical licensing board system through which the states, including Georgia, apply medical expertise and judgment to all physician licensing decisions. The AMA and MAG emphatically repudiate the conduct for which Dr. Dicter was convicted. However, the issue *sub judice* is not Dr. Dicter's conduct, which clearly warrants criminal sanctions. Rather, it is whether the federal government improperly invades the province of the state by forfeiting a state-issued medical license rather than leaving the issue of licensure up to a state-appointed panel of physicians.

> It has long been the policy of the AMA that the evaluation of information collected by licensing boards be undertaken only by persons experienced in medical licensure and competent

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State Medical Association, Montana Medical Association, Nebraska Medical Association, Nevada State Medical Association, New Hampshire Medical Society, Medical Society of New Jersey, New Mexico Medical Society, Medical Society of the State of New York, North Carolina Medical Society, North Dakota Medical Association, Ohio State Medical Association, Oklahoma State Medical Association, Oregon Medical Association, Pennsylvania Medical Society, Rhode Island Medical Society, South Carolina Medical Association, South Dakota State Medical Association, Vermont State Medical Society, Medical Society of Virginia, Washington State Medical Association, State Medical Society of Wisconsin, and Wyoming Medical Society.

> to make judgments about physician competence. It is recommended that decisions concerning medical competence and discipline be made with the participation of physician members of the board.

AMA Policy H-275.978(8). MAG endorses this policy in its entirety.

In keeping with the position long advocated by the AMA and MAG, Georgia and the other states have legislatively adopted criteria, mechanisms and safeguards by which experts in the field make licensure decisions for the protection of patients, the public and physicians. The Eleventh Circuit, departing from the holding of other Circuits, authorized the federal government to override licensure decisions by state medical boards, and unconstitutionally expanded the scope of federal power over medical licensure, thus opening the door to further intrusions.

It is the experience of the AMA and MAG that the system that requires a board consisting primarily of physicians to decide who should be allowed to practice medicine provides the best protection to patients, the public and physicians. Perhaps more importantly, states, including Georgia, have made the legislative judgment that a board consisting primarily of physicians is best equipped to make medical licensure decisions. This was a valid exercise of their police power to regulate the practice of medicine. The AMA and MAG have an interest in preserving from an unconstitutional invasion by the federal government a state licensure system that has worked well and provides important safeguards.

SUMMARY OF THE ARGUMENT

The Petition for Certiorari should be granted to resolve a split in the Circuits and to prevent the unconstitutional expansion of federal authority into state licensure of physicians. The forfeiture to the federal government of a state-issued medical license violates the Tenth Amendment.

The states have the police power to control medical licensing. They have exercised that power to establish rules and procedures for physician discipline and license revocation. Under Georgia law, the conviction of a felony does not automatically result in the loss of a medical license. The Georgia Composite Board of Medical Examiners ("the Georgia Medical Board") has the discretion to evaluate the facts underlying a conviction and, on behalf of the state in the exercise of its police powers, to decide to revoke, suspend or limit a medical license, or to leave it intact and in force.

The federal forfeiture of a state-issued medical license interferes with the power of the state to control medical licensing. The federal government admitted here that it was seeking forfeiture because of a concern that the Georgia Medical Board might not agree that Dr. Dicter should lose the privilege to practice medicine in Georgia, and might decide to allow him to practice medicine after his term of incarceration ended. Thus, the federal government admittedly was seeking to substitute its judgment for that of the agency charged by the state legislature with regulation of the practice of medicine.

Even without such an admission, the act of forfeiting a medical license in a federal proceeding rather than allowing the state agency charged with making the licensure decision to exercise its decisionmaking authority is an unwarranted and unconstitutional interference with the state's power to regulate the practice of medicine.

The Eleventh Circuit held that the federal forfeiture of Dr. Dicter's state medical license did not infringe upon the decisionmaking power of the Georgia Medical Board because if the Georgia Medical Board disagreed with the action, the Board could simply issue a **new** license to Dr. Dicter. The Eleventh Circuit further held that the decision as to whether to issue a new license was a matter "solely" of state law.

The Eleventh Circuit's recognition that the Georgia Medical Board could issue a new license to Dr. Dicter, and the acknowledgement that federal law plays no role in that state decision, proves the point that licensure of a physician is exclusively a state matter. The holding that it is solely a matter of state law whether to give Dr. Dicter a new license after forfeiture to the federal government illustrates that the real decision as to licensure belongs to the state and is outside the scope of the powers of the federal government. The Eleventh Circuit erred in holding the forfeiture of Dr. Dicter did not violate federalism concerns.

The Eleventh Circuit also erred in its holding that the state medical license constituted property for purposes of the forfeiture statute. The Eleventh Circuit relied upon decisions dealing with whether there was a property interest in a license so as to require due process before revocation. The Eleventh Circuit ignored Georgia caselaw establishing that the license itself is not property.

ARGUMENT

I. FEDERAL INTERVENTION IN STATE MEDICAL LICENSING DECISIONS VIOLATES THE TENTH AMENDMENT.

The Petition for Certiorari should be granted to resolve a split in the Circuits and to prevent the unconstitutional expansion of federal authority into state licensure of physicians. The nature of that split is described in

detail in the Petition for Writ of Certiorari, filed with this Court by Richard M. Dicter, M.D. The forfeiture to the federal government of a state-issued medical license violates the Tenth Amendment.

A. The Regulation of Medical Licensing is a Sovereign Power Traditionally Reserved to the States.

Georgia, like every state, possesses the police power to control medical licensing of its physicians. As this Court recently held, "the Constitution reserves the general police power to the States." *United States v. Morrison*, 120 S.Ct. 1740, 1754 n. 8 (2000). Ample prior authority makes it clear that one of the sovereign police powers traditionally exercised by the states and reserved to the states by the Tenth Amendment is control over the practice of medicine. The state's sovereign power in this area was recognized by this Court as early as 1925 in *Linder v. United States*, 268 U.S. 5, 18 (1925), when it held, "[o]bviously, direct control of medical practice in the states is beyond the power of the Federal government." More recently, in *Pegram v. Herdrich*, 120 S.Ct. 2143, 2158 (2000), the Court held that "the field of health care [is] a subject of traditional state regulation." *See Barsky v. Board of Regents*, 347 U.S. 442, 449 (1954) ("It is elemental that a state has broad power to establish and enforce standards of conduct within its borders relative to the health of everyone there"); *id.* at 449 ("The state's discretion in that field extends naturally to the regulation of all professions concerned with health"); *Yeargin v. Hamilton Memorial Hosp.*, 171 S.E.2d 136, 139 (Ga. 1969) ("the preservation of public health is one of the duties devolving on the state as the sovereign power, and the discharge of this duty is accomplished by means of the exercise of the inherent police power of the sovereign . . . it is perfectly clear that the state may interfere with the right of the individual

and place restrictions and regulations on the practice of medicine."); *Hughes v. State Board*, 134 S.E. 42, 46 (Ga. 1926) (same); *Bhan v. NME Hospitals, Inc.*, 669 F. Supp. 998, 1003 (E.D.Cal. 1987) (licensing of medical professionals is a matter within the state's police power); *Szeto v. Louisiana State Bd. of Dentistry*, 508 F. Supp. 268, 271 (E.D. La. 1981) (states enjoy a police power to regulate the medical profession in any manner consistent with the United States Constitution).

The state's sovereign power of medical licensing extends beyond the initial grant of a license and includes the establishment of standards of conduct and practice, discipline, license suspension or revocation. *See, e.g., Barsky*, 347 U.S. at 451 ("a state's legitimate concern for maintaining high standards of professional conduct extends beyond initial licensing").

B. The States, Including Georgia, Have Enacted Regimes for the Grant, Denial, Suspension or Revocation of Medical Licenses by Appointed or Elected Boards of Physicians Applying Factors and Standards Adopted by the State Legislatures.

Like every other state, Georgia has adopted a complex regulatory scheme governing the practice of medicine and the grant, denial, revocation or suspension of medical licenses, and the discipline of physicians. *See* O.C.G.A. §§ 43-34-1 through 43-34-46 (1999) (statutes governing practice of medicine, creation of Georgia Medical Board, and licensure of physicians); Rules and Regulations of the State of Georgia, 360-2-.01 through 360-15-.02 (1999) (regulations governing Georgia Medical Board and medical licensure).

In Georgia, twelve of thirteen members of the Georgia Medical Board are required by statute to be physicians. O.C.G.A. § 43-34-21(b). This is consistent with the AMA policy described above. All members of the Georgia

Medical Board are appointed by the Governor and confirmed by the State Senate. O.C.G.A. § 43-34-21(a).

Under the state regulatory regime, a medical license may be suspended or revoked by the Georgia Medical Board based upon conviction of a felony. O.C.G.A. § 43-34-37(a)(3). Other "offenses" which may lead to suspension or revocation of a license by the Georgia Medical Board include, *inter alia*, failure to maintain appropriate records of prescriptions for Schedule II drugs (Rules and Regulations of the State of Georgia, 360-2-.09(d)); "prescribing drugs for a habitual user in the absence of substantial medical justification," (*id.*, 360-2-.09(e)); "repeated prescribing of controlled drugs for personal or family use," (*id.*, 360-2-.09(g)); and, violating the Georgia or Federal Controlled Substances Act (*id.*, 360-2-.09(k)).

C. Forfeiture Upon Conviction of a Crime Without a Hearing Before a Panel of Physicians Is Contrary to the State Regulatory Scheme.

Under Georgia law, the conviction of a felony, even a violation of the Controlled Substances Act, or writing illegal prescriptions, does not give rise to automatic license revocation. That law is consistent with the due process rights recognized in *Rehman v. California*, 85 S.Ct. 8, 9 (1964), in which Justice Douglas held that a separate hearing, considering factors other than those involved in the criminal case, is required before revocation of a medical license.

> A doctor might well go to prison for a misdeed in connection with his practice and yet not automatically lose his right to practice medicine. Deprivation of a professional license should require a hearing, since broader issues than those in the criminal case are involved, e.g., whether the misdeed is of a character to

> make it unsafe and improvident for the State to entrust a medical license to that person.

Rehman v. California, 85 S.Ct. 8, 9 (1964) (emphasis added).

Consistent with this due process requirement and pursuant to its power to regulate the practice of medicine, the Georgia legislature has adopted a system whereby the Georgia Medical Board, consisting of expert physicians, is to investigate, hold a hearing and then choose from the following penalties for any of the offenses that may lead to license revocation:

> (A) Refuse to grant a license to an applicant;
> (B) Administer a public or private reprimand, provided that a private reprimand shall not be disclosed to any person except the licensee;
> (C) Suspend any license for a definite period;
> (D) Limit or restrict any license [including restrictions preventing the physician from prescribing any or all drugs];
> (E) Revoke any license; or
> (F) Condition the penalty, or withold [sic] formal disposition, upon the physician's submission to the care, counseling, or treatment of physicians or other professional persons, and the completion of such care, counseling, or treatment, as directed by the Board.

O.C.G.A. § 43-34-37(b)(1). The Georgia Medical Board can also place a physician upon probation. O.C.G.A. § 43-34-37(b)(2).

Although perhaps irrelevant to a constitutional analysis, the reasonableness of the options other than license revocation and evidence that the Georgia Medical Board might have chosen a sanction other than revocation is demonstrated by the actions of the jury. The jury in this case asked the District Court if, rather than forfeiting his license, Dr. Dicter could keep his license subject to probation and monitoring by the Board and limited to disallow

prescription writing privileges; or, whether his license could be suspended rather than forfeited. A.24a. All of those options were open to the Georgia Medical Board under O.C.G.A. § 43-34-37(b). Compounding the error of depriving the Georgia Medical Board of its statutory and constitutional right and duty to consider those lesser penalties, the District Court also deprived the jury of those options by instructing the jury that the issue for its consideration was whether the medical license facilitated the crime and by refusing to allow instruction on any of the penalties less than forfeiture. A.21a-23a. The jury, deprived of any other option, held that the license facilitated the crime, and thus forfeiture was imposed by the District Court. Thus, the District Court not only usurped the role of the Georgia Medical Board, but it affirmatively prevented the consideration of the "broader issues" held in *Rehman* to be required by due process and of the lesser penalties adopted by the Georgia legislature in the exercise of its police power to regulate the practice of medicine.

Of course, any act by a physician in writing illegal prescriptions is surely "facilitated" by the physician's medical license. Under the District Court's instruction, forfeiture is essentially automatic. However, automatic forfeiture of a medical license as a result of a conviction for writing illegal prescriptions is inconsistent with the Georgia statutory scheme allowing the decision as to licensure after such a conviction to be made by the physicians on the Georgia Board, and providing a number of options other than revocation. Automatic forfeiture is also inconsistent with the holding in *Rehman*.

D. Forfeiture Allows the Prosecutor, Jury and Trial Judge to Substitute Their Judgment for That of the Medical Professionals Designated by the State.

There is no doubt that the forfeiture of a state-issued medical license interferes with the power of the state to

control medical licensing. At the time of Dr. Dicter's trial, the Georgia Medical Board was investigating Dr. Dicter's practice. (R4-3-13). In fact, the federal government expressly admitted here that it was seeking forfeiture because of a concern that the Georgia Medical Board might not agree that Dr. Dicter should lose the privilege to practice medicine in Georgia, and might decide to allow him to practice medicine after his term of incarceration ended. As the government told the district court, "[t]here is no guarantee the Board would take the license or wouldn't give it back at some point."(R14A-10). Thus, the federal government has admitted that in seeking forfeiture it was seeking to substitute its judgment for that of the state agency charged with enforcing the state police power of regulation of the practice of medicine.

Even without such an admission, the mere act of forfeiting a medical license in a federal proceeding rather than allowing the state agency charged with making the licensure decision to exercise its decisionmaking authority is an unwarranted and unconstitutional interference with the state's power to regulate the practice of medicine. *Linder*, 268 U.S. at 18 ("control of medical practice in the States is beyond the power of the Federal Government."); *Morrison*, 120 S.Ct. at 1754 n. 8 ("the principle that 'the Constitution created a Federal Government of limited powers' while reserving a generalized police power to the States is deeply ingrained in our constitutional history.") Certainly the offenses for which Dr. Dicter was convicted justified the imposition of sanctions against his license. But, "under our federal system that remedy must be provided by the [state], and not by the United States." *Morrison*, 120 S.Ct. at 1759.

E. The State's Ability to Issue a New License Immediately After Forfeiture Demonstrates That Control Over Licensure Belongs to the State.

The Eleventh Circuit held that forfeiture of Dr. Dicter's state medical license was not an infringement upon the decisionmaking power of the Georgia Medical Board because if the Georgia Medical Board disagreed with the action, the Georgia Medical Board could simply issue a new license to Dr. Dicter. The Eleventh Circuit further held that the decision as to whether to issue a new license was solely a matter of state law:

> The State of Georgia has a powerful interest in controlling the licensing of physicians practicing in Georgia. Nonetheless, we do not see how the forfeiture of Defendant's medical license prohibits the state licensing board from regulating Defendant's practice of medicine in Georgia. The district court simply ordered the forfeiture of a definite thing, a *particular* medical license: the medical license held by Defendant and "issued by the Georgia Composite Board of Medical Examiners." The district court's order of forfeiture does not purport to forfeit any other medical license, including one that might be issued to Defendant by the Georgia medical licensing board in the future.
>
> Furthermore, Defendant's license was forfeited on the ground that it was "used . . . to facilitate the commission of" Defendant's unlawful distribution of controlled substances from 1992 through 1994. *See* 21 U.S.C. § 853(2). Any license that might be issued in the future (but has not yet been issued, and certainly was not in existence between 1992 and 1994) could not have facilitated the Defendant's unlawful distribution of controlled substances. Therefore, any such

> future license was not forfeited to the United States. **Whether the Georgia medical licensing board is authorized to issue another, *different medical license* to Defendant in the future is an issue solely of Georgia law.** [footnote omitted] **The Georgia board's power is unaffected by this forfeiture.** Defendant's Tenth Amendment contention, therefore, lacks merit.

United States v. Dicter, 198 F.3d 1284, 1291-92 (11th Cir. Ga. 1999) (emphasis added).

The Eleventh Circuit's recognition that the Georgia Medical Board could issue a new license to Dr. Dicter, and the acknowledgement that federal law plays no role in that state decision, proves the point that licensure of a physician is exclusively a state matter. The holding that it is solely a matter of state law whether to give Dr. Dicter a new license after forfeiture to the federal government illustrates that the real decision as to licensure belongs to the state and is outside the scope of the powers of the federal government.[3] The Eleventh Circuit erred in holding the forfeiture of Dr. Dicter's license did not violate federalism concerns.

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[3] The Eleventh Circuit's discussion of this issue also demonstrates another error in its analysis. The Court held that the order of forfeiture did not impact the state's authority to issue a new license, and repeatedly held that the forfeiture was limited to "a *particular* medical license," the one that was "in existence between 1992 and 1994," 198 F.3d at 1291 (emphasis in original), because the offenses occurred between February 1992 and early 1994. The Court also noted that licenses issued by the Georgia Composite Board "shall be valid for up to two years." 198 F.3d at 1292 n. 10 (*quoting* O.C.G.A. § 43-34-24.1(d)). Unfortunately for the Eleventh Circuit's analysis, the forfeiture occurred on November 16, 1996 – more than two years after the last offense. Thus, the forfeited license could not have been the license in existence at the time of the offenses, rendering the forfeiture invalid under the Eleventh Circuit's own analysis.

F. If the Federal Government Can Constitutionally Impose Revocation of a License, It Could Grant a License or Overrule the Grant of a License.

Justice Thomas has warned of "Congress appropriating state police powers under the guise of regulating commerce." *Morrison*, 120 S.Ct. at 1759 (Thomas, J., concurring). If Congress intended the forfeiture statute to encompass the forfeiture of state medical licenses, then Justice Thomas's warning is prophetic indeed. For if Congress can pass a statute that allows the federal government to override a decision not to revoke a license, then it can pass a statute that allows the federal government to override a decision to grant or deny a medical license. The federal government would be free to appropriate from the states the police power to regulate medical practice and grant and deny medical licenses. Such a result would be utterly repugnant to the "deeply ingrained constitutional history" of state retention of general police powers, and of the power to regulate health and medical matters in particular. *Morrison*, 120 S.Ct. 15 1754 n. 8.

G. The Forfeiture of a Medical License Constitutes Unconstitutional Regulation of the Action of the State Medical Board.

As this Court held in *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997), the federal government may not regulate the actions of the executive branches of state governments. "The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." *Printz*, 521 U.S. at 935.

Sustaining the federal government's forfeiture of a state-issued medical license would, in effect, command the state Medical Board, a part of the state executive branch, to refrain from exercising its power to regulate medicine. It would prevent the Medical Board from considering, as is its statutory charge, the appropriate sanction for the conduct of the offending physician. It would result in regulation of the Medical Board, a state executive agency. *See New York*, 505 U.S. at 166 ("The Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States").

Further, under the Georgia statutory scheme, federal forfeiture would also command the Georgia Medical Board to take **affirmative** action, a commandment prohibited by *Printz*, 521 U.S. at 935 (federal government cannot "issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions"), **and to pay** for the "privilege" of doing the bidding of the federal government. *See Printz*, 521 U.S. at 930 (state executive branch cannot be required to absorb the cost of enforcing federal laws).

Under O.C.G.A. § 43-34-36, all medical licenses are registered with the Superior Court of the county in which the physician resides. When a physician loses a license, the Georgia Medical Board is required to notify the Superior Court of the county of the physician's residence of the loss of the license, provide a copy of the order pursuant to which the license was lost, **and pay a recording fee to record the order**. O.C.G.A. § 43-34-39.

The quantity of the burden imposed upon the state executive branch in receiving the order from the District Court, delivering a copy to the Clerk of the Superior Court, and paying a filing fee, is irrelevant under this Court's analysis in *Printz*. This Court held that the forced utilization of "one-half hour of an officer's time" to conduct background checks could be too great an imposition, *Printz*, 521 U.S. at 927-28, and that forcing a state law

enforcement officer to "receive" a request for a background check crossed the federalism line. Here, the Georgia Medical Board is forced to receive, copy and deliver the District Court's Order, and to pay a fee. Even "requiring state officers to perform discrete, ministerial tasks" violates the Tenth Amendment. *Id.* at 929. The imposition of these restrictions and burdens upon the Georgia Medical Board as a result of the forfeiture renders the forfeiture violative of the Tenth Amendment.

H. In Other Contexts, Federal Courts Have Forbidden Federal Interference with the States' Licensing of Professionals.

In various contexts, the federal courts have held that the federal government cannot interfere with the state granted licenses, particularly licensing of professionals. Many of the cases involve the states' licensure, pursuant to their police power, of attorneys. For example, in *United States v. Polk*, 556 F.2d 803, 804 (6th Cir. Tenn. 1977), *cert. denied*, 434 U.S. 862 (1977), the court **reversed** a district court's requirement that the defendant **forfeit** his license to practice law as a condition of probation, holding that the court's authority over the defendant "does not govern the State's licensing of its legal practitioners but is solely concerned with appellant's conduct during the term of the sentence involved."

The licensure of professionals is peculiarly a matter for the states, not the federal government, and this Court has held that it had "no authority to re-examine or reverse as a reviewing court the action of the Supreme Court of Michigan in disbarring a member of the Bar of the courts of that State for personal and professional misconduct." *Selling v. Radford*, 243 U.S. 46 (1917). *See United States v. Martinez*, 988 F. Supp. 975, 977 (E.D. Va. 1998) and *United States v. Pastore*, 537 F.2d 675, 681-82 (2d Cir. 1976) (acknowledging that "New York State has

exclusive jurisdiction over admission to, and removal from, the bar"); *Ginger v. Wayne County Circuit Court*, 372 F.2d 621, 625 (6th Cir. 1967) ("[T]he courts of the State of Michigan have exclusive jurisdiction over the admission of attorneys, the regulation of the practice of law, and the discipline and disbarment of attorneys, so far as the practice of law in the state courts is concerned."); *Gately v. Sutton*, 310 F.2d 107, 108 (10th Cir. 1962) ("The Supreme Court of Colorado has exclusive jurisdiction to admit attorneys to practice in the Colorado courts and to strike them from the roll for misconduct.")

Although a federal court may disbar an attorney from practice before that court, it lacks the constitutional power to revoke an attorney's **state** bar license. *See, e.g., In re Cook*, 49 F.3d 263 (7th Cir. Ill. 1995) (barring an attorney from practice in the Seventh Circuit's bar based on federal district judge's findings of ethical impropriety, but not disturbing the judgment of the state court ignoring the federal district court findings); *Sutherland v. Whetstone*, 1991 U.S. Dist. LEXIS 6946 (S.D. Ala. Feb. 22, 1991) ("[t]he federal court does not disbar lawyers from practicing in Alabama.").

That the federal courts have no authority to revoke or suspend state-issued licenses is not a new concept, nor is it limited to professionals. *See United States v. Snyder*, 852 F.2d 471, 474-475 (9th Cir. Cal. 1988) (no federal authority to revoke state-issued driver's license) (emphasis added), *quoting, United States v. Best*, 573 F.2d 1095 (9th Cir. Cal. 1978):

> [W]hile noting that a federal court had the power to limit a defendant's driving privileges within federal enclaves and to notify the DMV of a conviction, we held that the **federal courts could not directly suspend a state license, because this would violate fundamental principles of federalism.**

> "Where not required for protection of the federal interest, [a federal court] may neither suspend a state driver's license nor order the state to do so, any more than it could dissolve a state-chartered corporation in federal court warrant proceedings or sentence criminals convicted in federal courts to terms in the state prison." **Driver's licenses are issued pursuant to the states' police powers, and the federal government has no constitutional authority to interfere with a state's exercise of its police power** except to the extent the state's action intrudes on any of the spheres within the federal government itself enjoys the power to regulate.

(emphasis added).

In *United States v. Stenzel*, 1993 WL 276116 (N.D. Ill. 1993), a district court addressed a defendant's motion to modify conditions of probation which prohibited the defendant from acting as a tax preparer or real estate agent during the term of probation. The *Stenzel* court affirmed the condition, holding that "because Stenzel has not been required to forfeit or surrender any professional licenses, the challenged restrictions do not improperly bypass the state's professional regulatory mechanisms and procedures." *Id.* (emphasis added). The forfeiture of Dr. Dicter's medical license does improperly bypass the state's professional regulatory mechanisms and procedures. It is unconstitutional.

II. A STATE-ISSUED MEDICAL LICENSE IS NOT "PROPERTY" FOR FORFEITURE PURPOSES.

The Eleventh Circuit also erred in its holding that the state medical license constituted property for purposes of the forfeiture statute. The Eleventh Circuit held that the issue of whether a medical license was "property" subject to forfeiture was "confirmed by Georgia law," and cited prior Eleventh Circuit authority for the proposition that courts should look to state law to determine whether a

license is "property." 198 F.3d at 1290. The Eleventh Circuit, however, focused on the wrong body of state law.

Georgia medical licenses, though property for due process considerations, are not property for other purposes. In *Lowery v. Lowery*, 262 Ga. 20, 21, 413 S.E.2d 731, 732 (Ga. 1992), the Georgia Supreme Court held that medical licenses "bear no similarity to even the broadest view of property for purposes of equitable distribution. Their value is too speculative to calculate . . . [They have] no exchange value or transferable value in an open market, are personal to [the physician], terminate on his death, and cannot be assigned, sold, transferred or pledged." The Eleventh Circuit did not cite *Lowery*. Instead, it relied upon two older Georgia cases which held that a professional has a due process right to a hearing before the licensing board before revocation of a license (*Leakey v. Georgia Real Estate Comm.*, 55 S.E.2d 818, 819 (Ga. App. 1949)); and that "the right to practice medicine is . . . a valuable property right." (*Yeargin v. Hamilton Memorial Hosp.*, 171 S.E.2d 136, 139 (Ga. 1969)). Of course, a hearing before the licensing board as required by *Leakey* is exactly the protection of which the lower courts here **deprived** Dr. Dicter. And, the "valuable property right" at issue in *Yeargin* was hospital privileges, not a license to practice medicine.

Nonetheless, the AMA and MAG do not contend that a medical license is not a property right for purposes of a due process analysis. It clearly is. But, the Georgia courts have recognized a distinction between labeling a license "property" for due process purposes and for any other purpose. *See Lowery*, 413 S.E.2d at 732 (medical license is not property). The Eleventh Circuit simply relied upon the wrong body of state law.

CONCLUSION

For the foregoing reasons, the *amici curiae* respectfully pray that the Court grant the Petition for Certiorari

and reverse the decision of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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